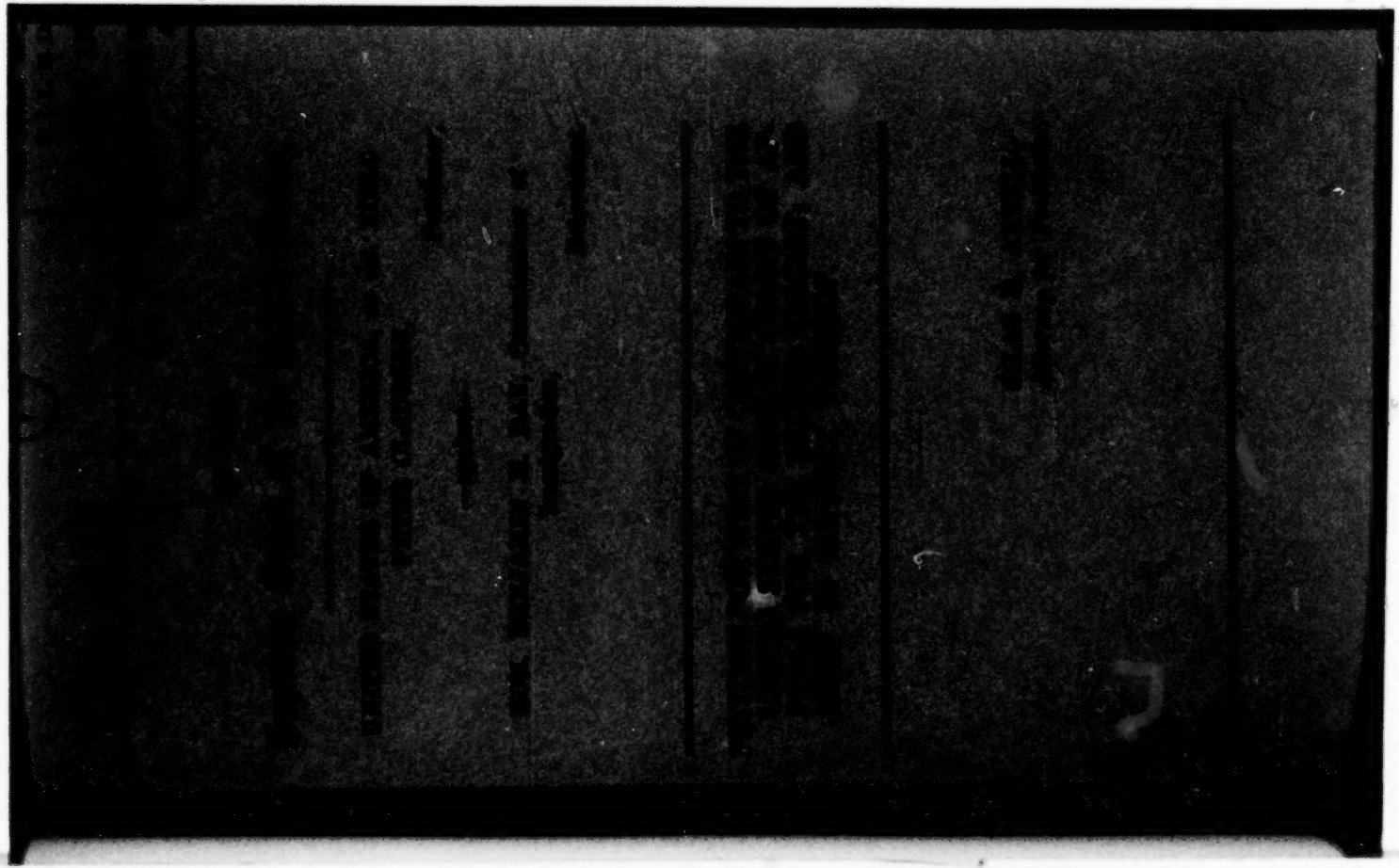

TABLE OF CONTENTS.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 2

PROCEEDINGS 5

QUESTION PRESENTED 7

REASONS FOR THE PETITION 7

POINT I—Petitioner, being unlawfully imprisoned and deprived of liberty by the present Commissioner of Immigration, presents by his writ of habeas corpus against the present Commissioner and by his petition to this Court, a present valid claim for release, of which he may not be deprived because of abatement of an earlier pending writ against another 11

POINT II—Claussen's arrival at Boston was not an "entry * * * to the United States" from a foreign country within the immigration laws, but if considered in the light of an arrival, constituted only an arrival from the American Port of New York from which he had shipped as merchant seaman on an American vessel for a round trip voyage; and more than five years had expired since his last arrival from a foreign country and entry here and before the crime, barring deportation 13

CONCLUSION 24

CASES CITED.

PAGE

Chinese Cabin Waiter, 13 Fed. 286 ..... 7, 9

Chinese Laborers on Shipboard, 13 Fed. 291 .....7, 8, 9

Ex parte T. Nagata, 11 Fed. (2nd) 178 (D. C. S. D. Cal.) 7, 10

In re Ross, 140 U. S. 453..... 12

Kirk v. *U. S. ex rel. Lawrenson* (C. C. A., 5th Cir.), 24 Fed. (2nd) 64 .....

Matter of Herscik, 1 Fed. (2nd) 449 .....7, 10

Matthews v. *Offley*, Fed. Cas. No. 9290 .....12, 14

Nagle v. *Hansen* (C. C. A., 9th Cir.), 17 Fed. (2nd) 557 .....

U. S. ex rel. Kowalenski v. *Flynn*, 17 Fed. (2nd) 524

Weedin v. *Banzo Okada* (C. C. A., 9th Cir.), 2 Fed. (2nd) 321 .....7, 8, 12

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ex rel.* NIELS PETER CLAUSSEN,

Petitioner,

—against—

HON. BENJAMIN M. DAY, Commissioner of Immigration,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Niels Peter Claussen respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, in the above entitled case.

The petition presents the same facts which led this Court to grant a writ of certiorari to this petitioner on March 7, 1927, to review a judgment dismissing an earlier writ of habeas corpus obtained against Commissioner of Immigration Henry H. Curran. After Mr. Curran resigned and was succeeded as Commissioner by the present incumbent Benjamin M. Day, the writ against Mr. Curran was by this Court directed to be dismissed as abated, on January 9, 1928, after the Court vacated the judgments of the District Court and the Circuit Court of Appeals

Statement of the Case.

The facts are undisputed. The petitioner, Niels Peter Claussen, is a native and subject of Denmark, having been born in Fiskbek, Denmark, on August 28, 1875 (R. 33, 36). He first entered this country on or about January 22, 1912, coming as a member of the crew of a British ship, and landing at Norfolk, Va. The next day he shipped on an American schooner, and, with the exception of short periods on shore in the United States, had sailed under the American flag ever since, up to the time of his conviction hereafter referred to. He received first naturalization papers in New York June 6, 1919 (R. 34). The last cruise the petitioner made into foreign waters was as a member of the crew of the American schooner "Elisha Atkins", signing on in New York October 19, 1917, and arriving back and signing off in Boston March 25, 1918 (R. 5, 34, 29-30). Thereafter, he made a few cruises in coastwise trade, and resided for a time on land as an agent of a seamen's labor union.

On June 17, 1921, petitioner was sentenced in the Cumberland County Court, Portland, Maine, for the crime of manslaughter, for the killing of one James Walker on May 21, 1921, in Portland. The sentence was after a plea of guilty by advice of counsel, and was for a maximum term of six years and the minimum term of four years and six months. The petitioner became eligible for parol in December, 1925.

On November 3, 1921, on a Department warrant, dated September 14, 1921, petitioner was technically taken into custody at the prison by immigration authorities, and a hearing conducted before an immigration

inspector, and petitioner was recommended to be deported at the expiration of his sentence in December, 1925.

On November 7, 1921, the record of the hearing was reviewed by the Inspector in Charge, S. H. Howes, who concurred in the findings and recommended deportation.

On November 19, 1921, a record of the hearing was reviewed by the Department of Labor, the findings of the examining inspector were affirmed, and the petitioner directed to be deported. A warrant for his deportation upon expiration of sentence was issued November 19, 1921.

The only ground upon which the recommendations of the examining inspector and the Inspector in Charge and the warrant of the Department of Labor were based, was a finding by such officials that the petitioner was convicted in this country of a crime involving moral turpitude committed, it was claimed, within five years after his entry into the United States, and the crime specified was that of manslaughter in connection with the killing of James Walker on May 21, 1921.

The only arrival of the petitioner at a port of the United Stataes, cited as an entry into the United States, within five years preceding the adjudged crime, was the alleged "entry" of petitioner at Boston on March 25, 1918, when he landed there from the American schooner "Elisha Atkins" after a voyage as a member of the crew thereof. The so-called "Certificate of Admission", dated August 31, 1921, itself shows that the petitioner signed on the "Elisha Atkins" as mate at New York on October 19, 1917, and arrived back in Boston as mate on board said vessel on March 25, 1918. In the hearing before the examining inspector it was shown that on that voyage the "Elisha Atkins" went from New York

to Para, South America, and back to the United States by way of Cienfuegos, Cuba.

In his official review of the case, it was recognized by Inspector in Charge Howes that:

> "It appears that he first arrived in the U. S. some 9 years ago, and since that time has sailed continuously under the American flag, up to the time of his conviction" (R. 36-37).

Although petitioner landed from the "Elisha Atkins" on March 25, 1918, it is to be noted that the so-called "Certificate of Admission" made out by Commissioner Skeffington, apparently as an afterthought to give such landing the coloring of an original "entry", preliminary to deportation proceedings, bears date of August 31, 1921—*over two years and five months after the landing on March 25, 1918; over two months after the sentence for the crime on June 17, 1921;* and over a month after an official report of the conviction to the immigration inspector in charge, dated June 27, 1921 (R. 29-30). This so-called "Certificate of Admission" obviously was not a *bona fide* certificate of admission of an alien from abroad issued concurrent with his landing, but obviously was "trumped up" over two years later to afford a colorable basis for the Department warrant, dated fourteen days later, September 14, 1921, and the hearing under date of November 3, 1921. Indeed, it should be noted that, by a slight alteration of the printed form, the certificate is made, not a *"certificate of 'admission'"* at all, but a certification of *"arrival"*. A printed reproduction of the certificate appears on pages 29 and 30 of the record. The original certificate attached to the original return shows that in item 3 of the certificate, the word "admitted" was

stricken out, and the word "arrived" typewritten above it, so that the item on the printed form which had read

"(3) Port at which admitted",

was changed to read

"(3) Port at which arrived".

Proceedings.

The writ of habeas corpus here involved is the second obtained on behalf of this petitioner. An earlier writ was allowed by Hon. John C. Knox, United States District Judge, on December 31, 1925, on petition of Chris Rasmussen, a friend of petitioner. That writ was argued before Hon. Francis A. Winslow, United States District Judge, who rendered an opinion dismissing the writ and remanding petitioner on January 27, 1926. An order was entered thereon February 1 ,1926. Petitioner thereupon filed a petition for appeal February 8, 1926, and the appeal was allowed by Hon. Henry W. Goddard, United States District Judge. On that appeal the Circuit Court of Appeals for the Second Circuit affirmed the decision of the District Court by a two to one majority, Judges Hough and Mack concurring in a majority opinion of affirmance written by Judge Mack, and Hon. Learned Hand writing a dissenting opinion (see R. 64-69). Mandate issued December 13, 1926. A writ of certiorari was granted by this Court March 7, 1927. On January 9, 1928, on a suggestion of abatement filed by the Solicitor General, this Court rendered a *per curiam* decision vacating the judgments of the District Court and Circuit Court of Appeals and dismissing the cause as abated, on the ground that under the Act of

February 13, 1925, §11, the cause against Mr. Curran had abated due to the failure, after his resignation as Commissioner, to substitute the new Commissioner of Immigration, Benjamin M. Day, within six months. A judgment to this effect was entered in the District Court March 19, 1928.

Thereafter petitioner surrendered to the custody of the Commissioner of Immigration, Benjamin M. Day, and was held for deportation. Petitioner thereupon executed the present petition for a writ of habeas corpus, showing all the facts; and the writ was allowed by Hon. T. D. Thatcher, United States District Judge, on May 1, 1928. On May 4, 1928, the writ was argued before Judge Thatcher, who dismissed the writ and remanded the petitioner to the custody of the Commissioner of Immigration (R. 78). On petition filed by petitioner, an appeal to the Circuit Court of Appeals for the Second Circuit was allowed on May 4, 1928 (R. 83-84). In addition, a notice of appeal was filed by petitioner (R. 86). On May 4, 1928, an order was signed by Judge Thatcher releasing petitioner in $1,000 bail. On June 4, 1928, petitioner made a motion before the Circuit Court of Appeals for an order advancing the cause on the Calendar to be heard before the close of the October, 1927, Term; and on the Court being advised that the appeal presented the same facts which had been presented on the appeal from the earlier judgment dismissing the previous writ, the Court, consisting of Judges Manton, Learned Hand and Swan, heard the cause and, on consent of counsel for both parties, rendered judgment *pro forma*, affirming the order of the District Court. Mandate issued June 12, 1928.

Question Presented.

Section 19 of the Immigration Act of February 5th, 1917, U. S. Code, Tit. 8, §155, provides:

> "Any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, *committed within five years after the entry of the alien to the United States,* • • • shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

It will be seen, therefore, that the only question presented on this appeal is whether, when Claussen shipped out of New York on the American schooner "Elisha Atkins" on October 19th, 1917, for a round-trip continuous voyage, as a member of the crew, to South American and Cuban ports *and return*, he departed from the United States, within the meaning of the Immigration Laws, with such effect that his arrival back in the United States, as a member of such crew, and landing at Boston, at the end of such voyage, on March 25th, 1918, constitutes a new entry into the United States within the meaning of the Immigration Laws, such as will toll the five-year period within which the crime, of which he was convicted, must have been committed in order to warrant deportation.

Reasons for the Petition.

The reasons for which the petition is presented are:

(1) That the Circuit Court of Appeals has decided an important question of Federal Law, which has not been,

but should be, settled by this Court, and has decided a Federal question in a way probably in conflict with applicable decisions of this Court (Rule 35).

(2) That the Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of the Circuit Court of Appeals for the Ninth and the Fifth Circuits on the same question (Rule 35).

(3) The decision of the Circuit Court of Appeals holds in effect that every coasting vessel or fishing smack which passes the league limit subjects all aliens on board to all conditions of admission into the United States, including the Quota Law, and that American crews must be made up of citizens and citizens only, and is contrary to the intention of Congress as respects the mercantile marine.

(4) The present petition presents precisely the same facts and questions of law which led this Court to grant a writ of certiorari on a previous application by this same petitioner for a writ to review the decision of the Circuit Court of Appeals sustaining the dismissal on a writ of habeas corpus against Commissioner of Immigration Henry H. Curran. After the resignation of Mr. Curran and the succession of Hon. Benjamin M. Day as Commissioner of Immigration, this Court vacated the judgments of the District Court and Circuit Court of Appeals and remanded the cause to the District Court with direction to dismiss the cause as abated, pursuant to Section 11 of the Act of February 13, 1925, on the ground that the six months period had expired within which a motion might be made asking this Court to permit that cause to be continued against the successor

in office. No determination on the merits of this cause was ever made by this Court; nor has there since been rendered any decision by this Court determining the questions presented. Petitioner now, by proper proceeding against Commissioner of Immigration Benjamin M. Day, validly presents the same questions of law, which remain as yet undetermined by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, and submits his brief hereto attached in support of this petition.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ex rel.* NIELS PETER CLAUSSEN,

Petitioner,

—against—

HON. BENJAMIN M. DAY, Commissioner of Immigration,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

Petitioner, being unlawfully imprisoned and deprived of liberty by the present commissioner of immigration, presents by his writ of habeas corpus against the present commissioner and by his petition to this Court, a present valid claim for release, of which he may not be deprived because of abatement of an earlier pending writ against another.

When, on advice by the Solicitor General that the six months period, wherein a petition may be presented requesting that a successor in office be substituted for a resigned official, had expired, this Court remanded to the District Court the cause then pending in this Court on certiorari, with direction to dismiss the said cause as

abated, the Court did not thereby deprive petitioner of a privilege of a hearing before this Court on habeas corpus as to the legality of his restraint and imprisonment. It is submitted that in no event can a wrongful imprisonment be countenanced or overlooked on the theory that an estoppel of the prisoner's right to a hearing on habeas corpus results on failure to substitute for a resigned official a successor official as party-respondent. In addition, in the present case this Court properly vacated the judgments of the District Court and the Circuit Court of Appeals before directing that the cause then pending against Mr. Curran, who had resigned as Commissioner of Immigration, be dismissed as abated. This left open and unadjudicated the question of the lawfulness of petitioner's imprisonment.

And after the former cause against Mr. Curran was dismissed as abated, pursuant to the direction of this Court, the petitioner, who had been at liberty on bail since the writ against Mr. Curran was obtained, surrendered himself for the first time to the custody of Hon. Benjamin M. Day, the present Commissioner of Immigration, and thereupon, while in custody of Commissioner Day, obtained the present writ of habeas corpus.

In no sense then does the dismissal of the former writ because of abatement of the cause against Mr. Curran bar petitioner from a hearing in the present proceeding against Commissioner Day.

This Court granted a writ of habeas corpus on the former application because a question was presented which required adjudication by this Court. That question has not been settled to date; and a writ of certiorari should therefore be granted for its review.

POINT II.

Claussen's arrival at Boston was not an "entry * * * to the United States" from a foreign country within the immigration laws, but if considered in the light of an arrival, constituted only an arrival from the American port of New York from which he had shipped as merchant seaman on an American vessel for a round trip voyage; and more than five years had expired since his last arrival from a foreign country and entry here and before the crime,—barring deportation.

The District Court and Circuit Court of Appeals in this case have erred in assuming, or ruling, that a man who ships on an American merchant vessel for a voyage beyond the three-mile territorial limits of the United States and return on the same vessel, without discharge abroad, leaves and quits the country within the meaning of the Immigration and Deportation Laws; and that when a merchant seaman at the end of the voyage steps ashore from an American vessel on which he shipped out from an American port for a round-trip voyage, he thereby makes an arrival or "entry" into this country within the meaning of such laws. In the majority opinion of the Circuit Court of Appeals (R. 67), an analogy is drawn between such arrival here and the return of one who has crossed the international bridge at Niagara Falls to Canada and after viewing the Falls from the Canadian side, returns over the bridge. But the analogy is not apt. It may be conceded that when one crosses the border, whether a foot or a mile into Canada, he has left the country, and re-enters it when he returns; but when one merely ships out onto the high seas as a member of the crew on an American merchant vessel, on articles

which recognize an American port as his home port and which call for a continuous, uninterrupted voyage over the seas and back to an American port, with discharge only in an American port, the situation is different, both on the simple fact of the matter and also because of the special laws applicable to such ships and seamen. It needs merely to consider the distinction that, whereas if the man who strolls into Canada commits a crime one foot over the border he is in no instance responsive to American law or process, the merchant seaman throughout the voyage is not only responsive to American law and to American process for crimes committed, but is also dependent throughout on American law for his rights. If it be, as stated by Judge Mack in the majority opinion (R. 65), that the statement that an American vessel is to be deemed American soil is "but a fiction", it is nevertheless a fiction *of law*, created, fostered and applied by the law, and, so far as the seaman's rights, duties and liabilities are concerned, is legal fact. Cases such as the one described by Judge Mack, of which *U. S. ex rel. Kovalenski* v. *Flynn*, 17 Fed. (2nd) 524, is an example, are in every way distinct from the case at bar, and have no bearing on the one question presented in this case.

This case can be determined only in the light of the peculiar provisions of law relating to merchant seamen and their status under Immigration and Naturalization Laws, and the special statutes early enacted and maintained in encouraging the merchant marine. The following are cases in which were applied, and which illustrate, the principles governing the case at bar:

Kirk v. *U. S. ex rel. Lawrenson* (C. C. A., 5th Cir.), 24 Fed. (2nd) 64;

Weedin v. *Banzo Okada* (C. C. A., 9th Cir.), 2 Fed. (2nd) 321;
Nagle v. *Hansen* (C. C. A., 9th Cir.), 17 Fed. (2nd) 557;
Matter of Herevik, 1 Fed. (2nd) 449;
Chinese Cabin Waiter, 13 Fed. 286;
Chinese Laborers on Shipboard, 13 Fed. 291;
Ex parte T. Nagata, 11 Fed. (2nd) 178 (D. C. S. D. Cal.).

By these cases it is well settled in most of the Federal Circuit and District Courts that one serving as a member of the crew of an American vessel on a round-trip voyage out of an American port to ports of foreign countries and back to an American port *does not depart from the United States in the contemplation of law*, but is at all times during the voyage within the United States and subject to the jurisdiction thereof.

The *Kirk* and *Okada* cases are directly in point on the one question in this case. And it should be noted that in the *Kirk* case the opinion of Judge Mack in the *Claussen* case is questioned. On facts as to "entry" and "arrival" almost identical, the Circuit Court of Appeals for the Fifth Circuit said in the *Kirk* case:

> "Appellee * * * was not subject to deportation for crime or for any other reason, unless it be that his return from a foreign voyage in 1926 was unlawful. It is contrary to all reason to suppose that every return of an alien seaman having rights as an American citizen, limited and qualified though such rights may be, from a foreign voyage to a port of the United States on an American vessel, should be within the ordinary rule that

> every entry constitutes a new entry. As pointed out by the Circuit Court of Appeals for the Ninth Circuit in *Weedin* v. *Banzo Okada*, 2 F. (2d) 321, to so hold would result in an irreconcilable conflict between R. S. §5363 (18 USCA §486), which punishes the master of any vessel who without cause intentionally leaves a seaman in a foreign port, and section 8 of the Immigration Act of 1917 (8 USCA §144), which punishes the bringing into the United States of an alien not duly admitted" (24 Fed. (2nd) 66).

The case of *Weedin* v. *Banzo Okada*, decided by the Circuit Court of Appeals of the Ninth Circuit in November, 1924, is directly in point on the circumstances of Claussen's arrival in March, 1918, and on the question of the effect of such arrival under the Immigration Laws. The only distinction between the *Banzo Okada* case and the case at bar is that Okada was sought to be deported under the provision requiring deportation of one of an excluded class, at any time within five years after illegal entry; while Claussen is sought to be deported under the provisions requiring deportation when a crime is *committed within five years after entry*.

In the case cited, Okada entered the United States unlawfully in 1917 and continued to reside here until June, 1921; thereupon he shipped as a member of the crew of an American vessel for a voyage from ports of the United States to Oriental ports and return. At the close of the voyage on August 26th, 1921, he returned to the United States with the vessel, as still a member of the crew thereof, and continued to reside here until apprehended on April 24th, 1924. Conceding that, if Okada's

landing in the United States upon arrival at the termination of the voyage from American ports to foreign ports and return should be construed an entry within the meaning of the Immigration Law, Okada must be deported, but that, if such arrival was not an entry, he must be discharged, the Circuit Court of Appeals held that such arrival at the end of the voyage was not an arrival from a foreign country, nor an entry within the Immigration Laws, and that, accordingly, Okada had not entered the United States within five years prior to the attempted deportation. The Court analyzed the statutes bearing upon the question and cited the *Chinese Cabin Waiter* and *Chinese Laborers on Shipboard* cases and said:

> "If the appellee had remained at all times on shipboard, it would scarcely be contended that he left the United States, and the fact that he was permitted to land at Honolulu for a few hours, by the captain, did not change his status" (2 Fed. [2nd] 322).

It cannot be held in the case at bar that Claussen made any entry in 1918 sufficient to toll the statute, without overruling the Kirk and Okada cases.

The case of the *Chinese Cabin Waiter* was under an Act of Congress prohibiting the master of a vessel from bringing into the United States any Chinese laborer from any foreign port or place. The Court construed the Act to mean the prohibiting of bringing any such laborer embarking at a foreign port or place for the United States, and not to apply to the arrival in port of such a laborer already on board the vessel, who had shipped out on the same when it left the American port, as a member

of its crew, and merely arrived back with the ship. The Court said:

> "And in this connection it should not be overlooked that the *petitioner, while on board the steamship as one of its crew, was within the jurisdiction of the United States, at all times under their protection, and amenable to their laws. An American vessel is deemed to be a part of the territory of the State within which its home port is situated, and as such a part of the territory of the United States*" (13 Fed. 289).

In *Chinese Laborers on Shipboard*, the last cited case was followed and the same rule held to control, although the petitioners had been permitted to land temporarily at a foreign port during the voyage, but without, however, any termination of their relation as members of the crew.

The case of *Matter of Herzvik* arose under Section 34 of the Immigration Law of February 5th, 1917, instead of Section 19 as in the *Okada* case and the case at bar, but is otherwise directly in point. Section 34 contains a special limitation of three years within which deportation proceedings may be had with respect to alien *seamen* who land unlawfully in the United States. In the *Herzvik* case the petitioners originally entered the country as seamen and thereafter resided in the United States or shipped on American vessels for a period of more than three years. Thereafter they shipped as members of the crew of an American vessel out of San Pedro, California, on a voyage to Chilean ports and return. They were apprehended at the return end of the voyage and ordered deported, and obtained a writ of habeas corpus. The

Court sustained the writ and ordered the petitioners released, saying:

> *"Petitioners do not come within the class known as immigrants,* defined in Section 3 of the Immigration Act of 1924 as being *aliens 'departing from any place outside the United States destined for the United States', for they did not depart from any foreign place, but departed from the United States for a continuous voyage which ended in a United States port"* (1 Fed. (2nd) 450).

In the case of *Ex parte T. Nagata*, the petitioner, a native of Japan, had for more than five years prior to October, 1924, been a resident of the United States. His employment was that of a fisherman. On October 4, 1924, he was employed by the owner of a motor fishing vessel called the "Washington", which had the status of an American vessel engaged in foreign commerce.

On October 4, 1924, the "Washington", with petitioner on board as one of the crew, visited nearby Mexican waters for the purpose of fishing. It returned to the port of Los Angeles on November 4, 1924. Petitioner was there detained by the immigration officers on the ground that he was not entitled to enter the United States. The particular charge made was that the alien entered on the 4th of November, 1924, by means of false and misleading statements. The Court sustained the writ and ordered the petitioner to be discharged and his bond exonerated, saying:

> "The question involved is as to *whether the going by the petitioner outside the territorial limits of the United States constituted a departure so as to give the character of an original entry to his*

arrival on the return trip. Petitioner did not leave the ship from the time it left the port of Los Angeles until it returned to the same port. *There was no intention on his part to land or remain in foreign territory permanently or temporarily. These facts bring the case directly within the case of Weedin* v. *Okada*, 2 Fed. (2nd) 321 (C. C. A. 9th), decided November 24, 1924, and *in re Herzvik and Kongsvik* (D. C.) 1 Fed. (2nd) 449, decided August 13, 1924. Respondent admits that, under the facts, the decisions cited being considered, petitioner is entitled to be discharged but argues that, in view of expressions of the Supreme Court of the United States in certain cases, an American ship is not to be considered as American ground while in foreign waters. To this point is cited *Scharrenberg* v. *Dollar S. S. Co., et al.*, 38 Sup. Ct. 28, 245 U. S. 122, 62 L. Ed. 189, and *U. S.* v. *N. Y. & Cuba Mail S. S. Co.*, 46 Sup. Ct. 114, 70 L. Ed. —, decided by the Supreme Court on December 14, 1925. I find nothing inconsistent with what was decided in the *Herzvik* and *Okada* cases in either of the decisions of the Supreme Court which respondent notes."

The foregoing decisions, directly in point, are in accord with the old cases which have established the status of the alien member of the crew of an American vessel

In re Ross, 140 U. S. 453;
Matthews v. *Offley*, Fed. Cas. No. 9290.

And in addition, as pointed out by the Circuit Court of Appeals, Ninth and Fifth Circuits, in *Weedin* v. *Banzo Okada*, and *Kirk* v. *U. S.*, above cited, any other ruling would result in making the provisions of R. S. Section 5363 (Comp. Stat. Section 10468) totally inconsistent

with the provisions of Section 8 of the Immigration Act (Comp. Stat. 1918, Com. Stat. Annotated Supplement 1919, Section 4289¼ d. d.). Section 5363 of the Revised Statutes provides that any master of an American vessel who, without just cause, forces a seaman on shore to leave him in a foreign port, or refuses to bring home again all the seamen whom he carried out, who are in condition and are willing to return, shall be punished by fine or imprisonment. At the same time, the other section cited, Section 8 of the Immigration Act, provides that any master of any vessel who shall bring into or land within the United States any alien not duly admitted or not lawfully entitled to enter or reside in the United States under the Immigration Laws shall be guilty of a misdemeanor and punished by fine and by imprisonment. As to the effect of these two statutes, the Circuit Court of Appeals in the *Okada* case well said:

> "If the contention of the Commissioner of Immigration is upheld, the master of an American vessel with alien seamen on board is placed between two fires. If he refuses to return them to the home port he is guilty of a misdemeanor, and if he does return them he may be guilty of a felony" (2 Fed. (2nd) 322).

The decisions above cited are likewise in accord with the policy of the enactments of Congress, as illustrated by Revised Statutes, Sections 4573 to 4579, regulating the protection of American seamen on foreign cruises; while the decision of the courts below in the case at bar is wholly out of accord with such statutes.

Thus, revised Statutes, Section 4573, requires that before clearance is granted to any vessel bound on a foreign voyage, the captain shall deliver to the Collector of Customers a sworn crew list.

Sections 4574-5 contain provisions respecting such list.

Section 4576 requires that the master of any such vessel, on return to an American port, shall exhibit the certified copy of the crew list with which he sailed out, and shall produce each person whose name appears thereon; and he and the owner shall be fined $400 for the failure to produce any such person, unless it is shown that such person has been properly discharged abroad with the consent of a consular official or has died or absconded or has been forcibly impressed into other service.

Section 4577 requires that the consular official shall povide for sustenance and passage to some American port for any seaman of the United States found destitute in such official's respective district. Under this section, *Matthews* v. *Offley*, Fed. Case No. 9290, above cited, was decided, it being held that *aliens* employed on American vessels are *seamen of the United States* within the meaning of this section.

Section 4578 requires all masters of American vessels to transport such seamen back to an American port when so instructed by a consular official; and Section 4579 provides for allowances for such transportation.

The protective provisions of the Federal statutes above referred to relate to and enure to the benefit of "American seamen" or "seamen of the United States" as a general class, without regard to whether they are American or alien citizens.

Matthews v. *Offley*, Fed. Cas. No. 9290, and other case above cited and discussed.

And the solicitations for the welfare of American seamen—including persons of alien citizenship but serving

as seamen upon American vessels—shown by the statutes above referred to, and particularly the provision requiring that they be cared for by American consuls, and, when stranded abroad, be returned to the United States, is utterly inconsistent with any theory that, when arriving back at the end of a voyage as a member of the crew of an American vessel, without having left the vessel abroad, such a seaman is to be considered an immigrant.

In addition to the foregoing, it is to be borne in mind that this relator had taken out "first papers" to become a citizen on June 6th, 1919. He took such papers out as a seaman under Section 4352 of the Compiled Statutes, covering the Act of June 29, 1906, Chap. 3592, Sec. 4, as amended by Act of June 25, 1910, Chap. 401, Sec. 2, and Act of May 9, 1918 (Chap. 69, Secs. 1-3). Under that section the seaman need not prove five years' residence as a condition to naturalization, but may, instead, prove three years' service as an American seaman after taking out first papers. Paragraph 8 of such section contains this provision:

> "Every seaman, being an alien, * * * shall, *for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen.*"

Under this section, at all time since the relator applied for first papers on June 6th, 1919, he has been and is entitled to be "deemed" an American citizen "for all purpose of protection as an American citizen".

The immigration authorities have taken an anomalous position in this case, and an inconsistent position, which is clear from the following: From the record, it is clear that even after March 25th, 1918, the relator continued to sail on American vessels in the coastwise trade. From

the record, it is also clear that at all times subsequent to January 22nd, 1912, and until March 25th, 1918, the relator shipped continuously on American vessels on round-trip voyages out of American ports and back. Now, so far as an alien's status as an American seaman is concerned, there is no distinction between service by him on American ships making foreign cruises and those sailing in coastwise trade. Even in coastwise trade, the seaman goes out on the high seas. And in foreign trade, if he ships for a round trip, he is none the less in American territory by reason of being a member of the crew of an American vessel than when he is a member of such a crew in coastwise trade. Claussen was just as much out of the United States, therefore, on subsequent voyages on coastwise cruises as he was when he sailed out on the "Elisha Atkins" for a round-trip voyage.

The truth is, he has never been out of the United States, within the meaning of the Immigration Laws, since his arrival here on January 22nd, 1912. Nor has he since that date ever arrived here "from a place outside of the United States". It follows that the alleged crime of which he was convicted was not committed within five years of his entry into the country.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals fails to give proper effect to the Acts of Congress involved herein, and therefore your petitioner respectfully prays that a writ of certiorari issue to enable this Court to review the decision of the Circuit Court of Appeals.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner.